

Durham Research Online

Deposited in DRO:

23 April 2015

Version of attached file:

Accepted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

O'Donoghue, Aoife (2013) 'International constitutionalism and the state.', *International journal of constitutional law.*, 11 (4). pp. 1021-1045.

Further information on publisher's website:

<http://dx.doi.org/10.1093/icon/mot048>

Publisher's copyright statement:

This is a pre-copyedited, author-produced PDF of an article accepted for publication in *International Journal of Constitutional Law* following peer review. The version of record O'Donoghue, Aoife (2013) 'International constitutionalism and the state.', *International journal of constitutional law.*, 11 (4): 1021-1045 is available online at: <http://dx.doi.org/10.1093/icon/mot048>.

Additional information:

Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a [link](#) is made to the metadata record in DRO
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the [full DRO policy](#) for further details.

International Constitutionalism and the State

International constitutionalization presents a challenge to the traditional international legal order and particularly the role of the state. The state is currently in a period of flux within international law. Constitutionalization presents one possible future understanding of the role of the state in international governance. Arguably for a process of constitutionalization to occur some core norms of constitutionalism must be present. Two norms of constitutionalism, the separation of powers and democratic legitimacy, present particular difficulties for the role of the state in current international law. As long as state's actions as part of an international constitutional order remain unresolved, the process of constitutionalization itself cannot said to be complete or indeed legitimate.

1. International Constitutionalism and the State

The state dominates the historical narrative of modern international law.¹ The traditional account establishes that from the signing of the Peace of Westphalia to the present, the state, as defined by the terms of recognition (defined territory, defined population, control over internal and external relations) and sovereignty are the centrifugal force in international law.² In recent years, the advent of multiple international actors requires a reconsideration of this account of the state's place in the international legal order.³ Regarding the state as the all encompassing sole subject of international law is no longer sound. Alongside this evolution, the developing theory of international constitutionalization requires a reflection on the operation of the international legal order.⁴ This paper asks what impact international constitutionalization would have upon the state and further whether such a change would be advantageous to the international legal order.

Settling the future of the state is not easy. Between suggesting that the state will remain the core subject and object of international law and the dismantling the state as the crux of the international legal order is the argument that the state is instead in

¹ See Joseph R. Strayer, *On the Medieval Origins of the Modern State* (1979), Susan Marks, *State Centrism, International Law and the Anxieties of Influence* 19 *Leid J. Int'l L.* 339 (2006)

² Montevideo Convention on the Rights and Duties of States 1933 (1934) 165 *L.N.T.S.* 19, Article 1, Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), James Crawford, *The Creation of States in International Law* (2006) In referring to the state it is meant as the Westphalian state within international law as opposed to the regulatory, pluralist or any other form.

³ Christian Walter, *Constitutionalizing (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law* 44 *Ger. Year. I. L.* 170 (2002), Michael Reisman, 'Designing and Managing the Future of the State' 8 *Eur. J. I L.* 409 (1997)

⁴ For an overview of the historical development of the constitutionalization debate see Ronald St. John Macdonald, *The International Community as a Legal Community* in, 'Towards World Constitutionalism – Issues in the Legal Ordering the World Community' 879 (Ronald St. John Macdonald and Douglas M. Johnston eds. 2005), Torkel Opsahl *An "International Constitutional Law"?* 10 *Int. Comp. L. Q.* 760 (1961)

a period of transformation.⁵ This midway stance argues that the position of the state is at a point of flux and this turbulence may lead to the establishment of a legal order in which the hitherto objects of international law, international organisations and individuals, among others, are, like states, subjects of international law.⁶ While the degree to which this transformation is occurring is not the focus of this piece, the recognition of a shift in the fundamental parameters of international law necessitates consideration of the possible shape of a future international legal order. If the transformation is to be constitutional, how the state will and should fit into this new system needs careful consideration. This is an important question as it focuses on the core of how the international legal order has up to the present operated and asserts that describing international law through the action of states alone is unfeasible.

Contributing to the volatility in accounts of the role of the state is the wavering boundaries between international and domestic law that no longer, if indeed they ever were, easy to maintain.⁷ This is coupled with the role of regional legal orders which establish new layers of governance.⁸ The extent of the states' remit within international law and the debate on the 'crisis of territoriality' and its consequences is linked to the rise of regional orders.⁹ In accounting for the operation of international governance, the more traditional accounts of international law lead to a fissure. Consequently, a more complex account of the international legal order with the state as one of a number of international actors must be intertwined with the recognition of the workings of other legal orders.¹⁰ This necessitates a revisit of the perceived wisdoms of international law, and one method of doing so is to consider what impact a constitutionalization process may have upon the role of the state in international law.

Habermas points to the gap between the actuality of governance beyond the state and the procedures which have served nation states as the sole subjects of

⁵ Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (2005), Anne-Marie Slaughter, Burke-White, *Future of 'The International Law Is Domestic (or, the European Way of Law)* 47 Harv. J. Int. L. 327 (2006), Oscar Schachter, *The Decline of the Nation-State and its Implications for International Law* 36 Colum. J. of Trans. L. 7 (1998)

⁶ Martti Koskeniemi, *The Fate of Public International Law; Between Technique and Politics* 70 Mod. L. R. 1 (2007) Jose Alvarez, *International Organizations as Law-Makers* (2005)

⁷ See for example the work within global administrative law such as Benedict Kingsbury, *The Concept of Law in Global Administrative Law* 20 Eur. J. I.L. 23 (2009) or the work of Anne Marie Slaughter, *A New World Order* (2004), Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures* 19 Lei. J. I. L. 579 (2006)

⁸ James A. Caparaso, *The European Union and the Forms of State: Westphalian, Regulatory or Post-modern* 34 J. of Common Market Studies 29 (1996), Charlotte Bretherton & John Vogler *The European Union as a Global Actor* (1999) Aurel Sari, *Between Legalization and Organizational Development: Explaining the Evolution of EU Competence in the Field of Foreign Policy*, in *EU External Relations Law and Policy in the Post-Lisbon Era* (Paul J. Cardwell ed. 2011)

⁹ Rafael Domingo, *The Crisis of International Law* 42 Vand. J. of Int. Law 1543 (2009), Seyla Benhabib, *Borders, Boundaries, and Citizenship* 38 Political Science & Politics 673 (2005)

¹⁰ Habermas argues that, '[a] world dominated by nation-states is...in transition toward the postnational constellation of global society. States are losing their autonomy, in part, because they have become increasingly enmeshed in the horizontal networks of a global society.' Jürgen Habermas, *The Divided West* (2006) 115-116, see also Alvarez, *supra* note 6

international law.¹¹ This flux or transformation may require a re-imagining of the role of the state. This re-imagining may be coupled with a perceptive change within international law towards a more constitutional rationale. This article seeks to discuss the international constitutionalization debate within international law and consider the impact that constitutionalism would have on the role of the state. While this article does not seek to empirically prove that constitutionalization is occurring it does proceed on the basis that changes are occurring within the international legal order which could be rightly described as nascent constitutionalism. This article seeks to understand the consequences of a constitutionalization process upon the state. This piece begins with three conceptions of the state in international law, this is followed by a discussion of the international constitutionalization debate, asking whether constitutionalization solely inhabits the state or may legitimately be considered beyond this confine and further, enquires as to the elemental norms of a constitutional order. The second half of the article examines two constitutional norms, separation of powers and democratic legitimacy, to decipher what impact international constitutionalization may have upon the state.

2. The State in International Law

The state is at the core of international, regional and domestic law. The differing roles the state plays within the three legal systems is without compare and while it fulfils varying roles in each legal order, the state remains central to understanding how each system works. The impact which the state as a legal entity has had on international law should not be underestimated.

Yet, from this traditional basis international law, centred on state consent, is giving way to a more differentiated legal order. The models of multilateralism, the establishment of doctrines such as *jus cogens*, among other changes, produces a network of laws which can no longer be described as purely consensual.¹² Further, the establishment and proliferation of multilateral organisations changes the features of international law and calls traditional aspects of sovereignty into question.¹³ Various theories, including fragmentation,¹⁴ global legal pluralism¹⁵ and constitutionalization seek to rationalise these changes into a coherent theory to account for this transformation in international law.

¹¹ Jürgen Habermas, *Constitutionalisation of International Law and the Legitimation Problems of a Constitution for World Society* 15 *Constellations* 444, 444-445 (2008)

¹² See for example the work of Alexander Orakhelashvili, *Peremptory Norms in International Law* (2008)

¹³ Dan Sarooshi, *International Organizations and their Exercise of Sovereign Power* (2007)

¹⁴ Martti Koskenniemi & Päivi Leino *Fragmentation of International Law? Postmodern Anxieties* 15 *Lei. J. of Int. L.* 553, (2002) Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law* 25 *Mich. J. of Int. L.* 849, (2003-2004) Bruno Simma, *Fragmentation in a Positive Light* 25 *Mich. J. of Int. L.* 845, (2003-2004) International Law Commission, 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law' Vol. II Part Two *Yearbook of the International Law Commission* (2006)

¹⁵ Steven Wheatley, 'The Democratic Legitimacy of International Law' (2010), Steven Wheatley & Paul Berman, *A Pluralist Approach to International Law* 32 *Yale J. Int. L.* 301, (2007) Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2011)

Three differing explanations of the place of the state in international law underpin these changes: the Westphalian state, the modern state, and the end of the state as the core legal actor. The first, the classical Westphalia tradition, places the state as the sole subject and at the centre of international law. As the solitary subjects of international law, states possess the sole law-making power. Any other law formation bodies, such as international organisations, are mere avatars of states and, as such, enjoy their ability to form law as part of the delegation of power from the state. Other rules of international law, particularly *erga omnes* and *jus cogens*, do limit state action, but only to the extent that the international community of states is developing these norms as part of international law.¹⁶

Arguably sovereignty has, though this varies across the development of international law, a core meaning which focuses on the supreme authority within a territory.¹⁷ Sovereignty, as embodied in the state, is central to understanding this traditional perspective. The strict Westphalia position is buttressed by a narrow reading of Article 2.1 of the UN Charter which places sovereign equality at the heart of international governance and law-making.¹⁸ As such, international law and sovereignty are reliant upon each other. Sovereignty does not exist without the state and as such any purported international constitutional law is entwined with statehood.¹⁹ States and sovereignty are mutually reliant.

The second stance suggests that the traditional view of international law, as just described, is often overvalued.²⁰ Instead, what should be paramount is a modern notion of political authority linked to questions of legitimate governance and law formation. According to Sarooshi, questions of power allocation traditionally reside within the monopoly by government of decision making power.²¹ Yet, over time this monopoly is slowly eroding. The exact timing of this erosion is open to debate. Some highlight the commencement of multilateralism and the creation of the League of Nations, others focus on the establishment of the UN, still others propose that is at the end of 1970s when states past through a golden age towards a gradual reduction of their power,²² and yet others argue that is the advent of globalisation, the movement of capital and the emergence of several failed states²³ that has turned us into, in the words of Malanczuk, 'new medievalists.'²⁴ Intriguingly, neo-medievalism

¹⁶ Goldsmith & Posner *supra* note 5

¹⁷ Jean L. Cohen, *Sovereignty in the Context of Globalisation: A Constitutional Pluralist Perspective* in *The Philosophy of International Law* Samantha Besson & John Tasioulas, (eds. 2010)

¹⁸ Article 2.1 of the UN Charter, Martti. Koskenniemi, *The Future of Statehood* 32 Harv. Int. L. J. 397 (1991), for a critical examination of Koskenniemi's position see Sébastien Jodoin, 'International Law and Alterity: The State and the Other' 21 *Lei. J. of Int. L.* 1, 22 (2008)

¹⁹ Andreas Fischer-Lescano, 'Redefining Sovereignty via International Constitutional Moments?' available at <http://ssrn.com/abstract.873905>

²⁰ Thomas M. Franck, *Democracy, Legitimacy and the Rule of Law: Linkages* NYU Law School, Public Law and Legal Theory Working Paper No. 2. Available at SSRN: <http://ssrn.com/abstract=201054> or doi:10.2139/ssrn.201054, 14 (1999)

²¹ Sarooshi, *supra* note 13

²² Stephan Leibfried, Kerstin Martens, Peter Mayer, Achim Hurrelmann (eds.) *Transforming the Golden Age of the State* (2007)

²³ Schachter *supra* note 5

²⁴ Peter Malanczuk, *Globalization and the future role of Sovereign States* in *International Economic Law with a Human Face* 47 (Freidel Weiss, Eric Denters, Paul J. I. M. de Waart eds., 1998)

harks back to the pre-Westphalia era, when states were not the focus of international law, yet sovereignty as embodied by an individual, usually a monarch, was a central aspect of the legal order.²⁵ According to Raustiala, with fluid borders, more interdependence and technical advancement, traditional sovereignty can no longer be achieved.²⁶ This unlocks questions regarding the more traditional accounts of international law which bind the state to sovereignty.

The changing status of the state compels a reconsideration of both the state and sovereignty. Allott recognises the importance of states, but not in the absolutist fashion advocated by others. While not declaring an end to sovereignty, Allott regards change to be underway in the relationship between the state and international law.²⁷ Alternatively, Tomuschat supports a more cautious approach suggesting that the emergence of non-state actors in international law is an aspect of a change in the subjects of international law as a facet of the evolution of an international community but not a root and branch revolution. For Tomuschat states must act to the betterment of all humans within their jurisdiction and accordingly rules have emerged, driven from the constitutional principle of the common values of mankind, to substantiate this obligation.²⁸ The state ensures compliance with these laws and the state takes action against those who do not. This is not to discount other actors' involvement but to acknowledge that the states retain this key protagonist.

An alternate argument suggests a move away from the monopolisation of international law by the state. This movement, Habermas argues, is not only an important historical factor but one that is central to understanding the present constitutionalization of international law.²⁹ This shift does not displace the state within international law but rather recognises that the more traditional or classical interpretations of international law no longer serve to describe the law or the position of states.

By contrast, very few scholars advocate the third option, the emergence of a completely stateless international order.³⁰ Discussion of stateless international law should be set apart from debates on state-reform that focuses upon the

²⁵ Strayer *supra* note 1

²⁶ Kal Raustiala, *Rethinking the Sovereignty Debate* 6 J. Int. Eco. L. 841, (2003) Kal Raustiala, *Sovereignty and Multilateralism* 1 Chic. J. of Int. L. 401 (2000), The UN Secretary General has also ardently made this point, 'State sovereignty, in its most basic sense, is being redefined by the forces of globalization and international cooperation.' Introduction to the Secretary-General's Annual Report to the General Assembly, Press Release, SG/SM/7136, GA/9596, 20 September 1999.

²⁷ Philip Allott, *Review Essay Symposium: Phillip Allott's Eunomia and The Health of Nations Thinking Another World: 'This Cannot Be How the World Was Meant to Be'* 16 Eur. J. Int. L. 255, 264 (2005)

²⁸ Christian Tomuschat, *Obligations Arising for States without or Against Their Will* 241 *Rec. Des Cours*. 195 (1993-IV) 301-302 This is somewhat similar to the arguments presented by Fischer-Lescano arguing that sovereignty and state hood is core to international constitutionalisation, that one is necessary for the other see Fischer-Lescano *supra* note 19

²⁹ Habermas *supra* note 11, at 444

³⁰ Though as Schachter has pointed out the idea of stateless world order has been central to a number of theorists, Schachter *supra* note 5, at 21-22.

transformation of state structures within global governance.³¹ There are several variations of the stateless argument. One focuses on the rise of international and supranational organisations, non-governmental organisations, corporations, the changes brought about in international trade law and the increasing remit of human rights meaning that states' centrality to the international legal order will diminish to a point of dénouement. State extinction remains reliant on particular outcomes such as the creation of a multitude of supranational organisations, mirroring the EU, that continue well beyond that organisation's current plans, a trend which has yet to be substantiated.³²

Another variation on the stateless world takes a normative approach. Due to its overtly negative impact upon both law and society the state, as both a basis of sovereignty and nationhood within international law, should come to an end.³³ Yet, even as states morph into alternate and altered roles, they remain steadfast in the landscape of international law.³⁴ Indeed, while it would seem outlandish to propose either that states remain the sole makers of international law or that they will cease to part of a composite international legal order the necessity of considering their impact both as a historical fact and as basis of legal transformation remains imperative thus making the stateless narrative superfluous to the constitutionalization debate.³⁵

Nonetheless, in recognising that states remain part of the international legal order, however reduced their place, certain deficiencies appear in descriptions of international law. The issues of integrating other subjects of international law into the system or how a structure of governance will be incorporated into a revised legal order remain unanswered. This brings us to the potential place of constitutionalization in modern international legal order. While the identification of a move away from a statist regime is not always present in international constitutionalization theories, for some, the state is becoming less the focus of the legal order as the international community, regional organisations or international

³¹ For example, see Nozick's proposal for a minimal state in Robert Nozick *Anarchy, State and Utopia* 88 - 142 (1974)

³² Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm of International Law?* 4 Eur. J. Int. L. 447, (1993), Cornelia Navari, *On the Withering Away of the State in The Condition of States* 143 (Cornelia Navari ed.1991), Jan Scholte *Civil Society and Sovereignty in Post-state Circumstance in Re-envisioning Sovereignty: The End of Westphalia?* 331 (Trudy Jacobsen, Charles Sampford, Ramesh Thakur eds., 2008)

³³ Jodoin, *supra* note 18, for the classic view of the state as 'effectiveness' see Crawford, *supra* note 2, at 37. This is the identification of state that such propositions wish to end and a discussion of its critique Anne Peters, *Statehood after 1989: 'Effectivités' between Legality and Virtuality* 3 Proceedings of the European Society of International Law 171 (2010)

³⁴ John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism* 18 Cardozo L. Rev 903 (1996 - 1997)

³⁵ Anne Peters in Jan Klabbers, Anne Peters & Geir Ulfstein, *The Constitutionalisation of International Law* 198 (2009). Opposite propositions also exist suggesting that international law itself, if it can be described as law, is part of a campaign to actively undermine the state. John R. Bolton, *Is there really "law" in International Affairs* 10 Transnational Law and Contemporary Problems 1, 14-18, 26-27 (2000)

organisations taking centre stage.³⁶ If the international legal order is in a process of re-ordering into a constitutionalised system, the role of the state must adapt to the constitutional norms which are core to this constitutional order.³⁷

3. International Constitutionalization

Before discussing the impact of constitutionalization on the state, the first point to consider is constitutionalization and constitutionalism as legal concepts.³⁸ The range of uses of constitutionalization and constitutionalism makes an abridgment of their content unfeasible.³⁹ As such, this article does not account for the entire debate. After a brief discussion of the international constitutionalization debate as it stands, this section will focus on understanding the interaction between constitutionalization and the state. This will centre upon norms of constitutionalism and what changes they require of the state in a constitutionalization process.

Constitutionalism, as a theory of governance, requires a system of law to comprise core norms such as the rule of law, rules which constrain individual freedoms to tests of proportionality and necessity, separation of powers, rule orientated settlement of disputes, and inalienable human rights regimes.⁴⁰ Yet, there are competing views of what international constitutionalism entails. For Walker it is an 'indispensable symbolic and normative framework for thinking about the problems of viable and legitimate regulation of the complexly overlapping political communities of a post-Westphalia world.'⁴¹ Roth argues that a constitution serves to decide whether an enactment is valid law within a society.⁴² In this article, constitutionalism entails a core set of norms, most particularly the rule of law, democratic legitimacy and a division of power which form the basis of a governance order within a constitutional legal system, these norms form the basis of constitutionalism, no matter the legal order on which it is situated and thus, must be present.

³⁶ Fischer-Lescano argues that sovereignty and statehood remain central to any understanding of international constitutionalisation. Fischer-Lescano *supra* note 19, Allott *supra* note 27, at 264, Deborah Z. Cass, *The Constitutionalization of the World Trade Organization* (2005), Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (1998) 'Towards World Constitutionalism – Issues in the Legal Ordering the World Community' 879 (Ronald St. John Macdonald and Douglas M. Johnston eds. 2005)

³⁷ Walter *supra* note 3, at 173.

³⁸ See for example the discussion of different forms of domestic constitutionalism and why certain models cannot be transposed. JenRubenfeld, 'The Two World Orders' *The Wilson Quarterly* 28 (2003), Philip Allott, *The Concept of International Law* 10 Eur. J. Int. L. 31, 35(1999)

³⁹ Anne Peters & Klaus Armingeon, *Introduction –Global Constitutionalism from an Interdisciplinary Perspective* 16 *Indiana Journal of Global Legal Studies* 385, 387 (2009) & Karolina Milewicz, 'Emerging Patterns of Global Constitutionalization: Towards a Conceptual Framework' 16 *Indiana Journal of Global Legal Studies* 413 (2009)

⁴⁰ Jeffery L. Dunoff, *The Politics of International Constitutions in Ruling the World? Constitutionalism, International Law and Global Governance* 188 (Jeffery L. Dunoff & Joel P. Trachtman eds 2009) and Martin Loughlin, *What is Constitutionalisation?* in 'The Twilight of Constitutionalism' 47 - 48 (Petra Dobner & Martin Loughlin eds 2010)

⁴¹ Neil Walker, *Post National Constitutionalism and the Problem of Translation in European Constitutionalism beyond the State* 53 (Joseph H. Weiler & Marlene Wind eds., 2003)

⁴² Brad R. Roth, *Governmental Illegitimacy in International Law* (2000) 52, Graham Maddox, 'A Note on the Meaning of 'Constitution'' (1982) 76 *American Political Science Review* 805

Constitutionalization, besides the international context, can be described as a process where a legal system goes from an ad hoc, decentralised, and consent based order to a system where the law regulates the exercise of power and governance. Constitutionalization advances the pre-constitutional legal order as it moves away from a structure where the holders of power are entirely self-regulated and beyond review to a system which provides a formulation where review may take place.⁴³ As such constitutionalization can be considered to represent both a legal and political process. For the international legal order it would require an adoption of the norms of constitutionalism into the system until, over time, it becomes a fully functional constitutional order. This is not to suggest that international law will become politicised, but rather, that as a result of constitutionalization law will regulate most, though not all, holders of constituted power on a more consolidated basis than in a non-constitutionalised system.⁴⁴

Fundamentally, international constitutionalization proposes that elements of constitutionalism have, or will, become attributes of public international law detaching the state from its operation and recognising other agents or constituted power holders within the global governance system.⁴⁵ Already many agents act without the legal or formal regulation of the state and while constitutionalization as a legal process will not capture all activity, particularly those in the informal sphere, international constitutionalization offers an opportunity to re-evaluate the limitations of historic state-based constitutionalism. Yet, the place of the state within constitutionalization theories is inconsistent and the theories which currently propose a process of constitutionalization have varying implications for the state; from cementing its place in the legal order to sidelining it as one among a variety of subjects of international law. Arguably, constitutionalization gradually progresses in stops and starts rather than a sudden ruptures of constitutional transformation. States ought to be considered dynamic actors in such a constitutionalization process whose role will, and potentially has already, evolved to become a lesser participant within a constitutionalised international order though not to the point of complete

⁴³ For broad discussion of constitutionalism see Dario Castiglione, *The Political Theory of the Constitution* 44 *Political Studies* 417 (1996) and Neil Walker, *Taking Constitutionalism beyond the State* 56 *Political Studies* 519 (2008)

⁴⁴ For a general discussion of the historical relationship between power and international law see Richard H. Steinberg & Jonathan M Zasloff, *Power and International Law* 100 *Am. J. Int'l. Law* 64 (2006) and Thomas Franck, *Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium* 100 *Am. J. Int'l. Law* 88 (2006)

⁴⁵ Habermas describes the basis of constitutionalism as, 'the *terminus as quem* of the process of juridification of political power...the very idea of a constitution that a community of free and equal citizens gives itself. Habermas *supra* note 10, at 131 Teubner's focus on societal constitutionalisation pushes beyond the legal infrastructures and recognises constitutionalisation beyond a unitary juridific basis. Gunther Teubner, *The King's Many Men: The Self-Destruction of Law's Hierarchy* 31 *Law and Society Review* 763 (1997), Gunther Teubner *Breaking Frames: Economic Globalisation and the EMergence of Lex Mercatoria* 5 *European Journal of Social Theory* 199 (2002), Andreas Fischer-Lescano & Gunther Teubner, *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law* 25 *Mich. J. Int'l L.* 999 (2003-2004), Gunther Teubner *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012)

dissipation.⁴⁶ Thus it becomes necessary to consider what role, if any, a state may have within an international constitutional regime.

Considering the impact of recognising a move away from a state-centred system of international law both Berman's discussion of non-state jurisdictional assertions limited by definitional relationships to the state and Teubner's societal constitutionalization recognise the significance of both the shift and over reliance on the state narrative within international law.⁴⁷ Both views could lead to a conclusion that states are unnecessary in evaluating international law's future. But the state remains a mode of governance albeit amongst several, a significant point of contention for both pluralism and in a slightly different context, fragmentation.⁴⁸ Teubner's consideration of self-contained regimes as auto-constitutional emphasises the need to re-orientate the state within international law and more particularly for the purposes here, within international constitutionalization.⁴⁹ Teubner's transnational constitutionalism highlights the inadequacies of disregarding the plurality of agencies within global governance, both public and private, for the state laden narratives of constitutionalism.⁵⁰

This article attempts to balance transnational constitutionalism and pluralist orders with a focus on the governance impact of the state.⁵¹ While acknowledging that other agents of constitutionalism - the traditional governance structures, the private sphere and societal fluxes - this article questions how international constitutionalism, if understood as maintaining a quintessential character, changes the nature of the state as other constituted power holders tussle for influence within the global governance order.

De Wet contends that there is a move away from the state as the sole perpetrator of public decision-making as part of a much broader scheme where a core value system is supported by structures at national, regional, international and functional levels.⁵² This account does not exclude the state from an international constitutional order but rather re-aligns the existing governance structures to broaden and re-assign decision making.⁵³ When considering the place of the state in international constitutionalization the multitude of theories put forward appear contradictory.

⁴⁶ John D. Haskell, *The Strategies of Rupture in International Law: The Retrenchment of Conservative Politics and the Emancipatory Potential of the Impossible* 13 German Law Journal 468 (2012)

⁴⁷ Paul S. Berman, *The Globalization of Jurisdiction* 151 U. Pa. L. Rev. 311 (2002)

⁴⁸ Koskeniemi & Leino *supra* note 14, Simma, *supra* note 14, Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law* 60 Stanford Law Review 595 (2007-2008) International Law Commission, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law* Vol. II Part Two Yearbook of the International Law Commission (2006)

⁴⁹ Andres Fischer-Lescano & Gunther Teubner, *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law* 25 Mich. J. Int'l L. 999, 1014 (2003-2004)

⁵⁰ Teubner 'Fragments' *supra* note 45, 2-4

⁵¹ Krisch *supra* note 15

⁵² Erika De Wet, *The International Constitutional Order* 55 Int'l Comp. L. Quar. 51, 53, (2006) Erika De Wet, *The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order* 19 Lei. J. Int'l L. 611, 612 (2006)

⁵³ De Wet's approach to the re-alignment of public decision-making, does not conform to an absolutist model, but recognises that it can move between systems of governance, De Wet *supra* note 52 at 53.

Paulus suggests that international constitutionalization derives from a basis of recognised constitutional principles that up to recently was a focal point of domestic law. If the arguments in favour of domestic constitutionalism are comparable to those at the international level it would seem logical that it is acceptable to use similar principles when discussing constitutionalization as a movement within law as a whole.⁵⁴

In an attempt to rationalise the varying constitutionalization debates they are here divided into two groups; world order constitutionalization, and sectoral constitutionalization.⁵⁵ While these two are not necessarily easy to segregate such a division does emphasise the differing forms of international constitutionalization and the varying implications of the process for the state. Both produce differing end results therefore the division between sectoral and world order constitutionalization are important to understand the place of the state in the constitutionalization process.

While sectoral constitutional law is most often linked to institutional law it is actually much wider in its scope. Sectoral constitutionalization has two forms; one procedural and the second substantive. The procedural aspects are in the guise of the organisational structures while the substantive law emerges from a particular field of international law.⁵⁶ Sectoral constitutionalization often centres upon constitutional institutional structures with a focus on organisations, such as the UN or the WTO. Alternatively it also may also concentrate on the normative values evolving within a particular area of international law, such as human rights. Procedural and substantive sectoral constitutionalization acknowledge the shift from a treaty to a more complex system which recognises the move of states as members and decision makers of institutions or legal structures to the institution itself as a separate legal actor. Although this change may not always be characterised as constitutional it is indicative of the challenges which international constitutionalization presents to states.

World order constitutionalization considers international law to be one legal order based around a single process. It is a process of re-ordering Westphalian governance to a more sophisticated and hierarchal order. This does not require all of international law to become constitutional but rather certain aspects of the international legal order, as a pre-requisite, must become constitutional.⁵⁷ World

⁵⁴ Andreas L. Paulus, *The International Legal System as a Constitution in Ruling the World? Constitutionalism, International Law and Global Governance* (Jeffery L. Dunoff and Joel P. Trachtman eds 2009)

⁵⁵ An alternative division proposed by Van Mulligen, splits constitutionalisation between indirect and direct arguments. Johannes Van Mulligen, *Global Constitutionalism and the Objective Purport of the International Legal Order* 24 *Leij. J. Int'l L.* 277, 279 – 280 (2011)

⁵⁶ For example, within the WTO the substantive law is trade, within the UN the maintenance of international peace and security.

⁵⁷ Bardo Fassbender, *We the Peoples of the United Nations' Constituent Power and Constitutional Form in International Law* in *The Paradox of Constitutionalism* 273 (Martin Loughlin and Neil Walker eds. 2008) Andreas L. Paulus, *The International Legal System as a Constitution in Ruling the World? Constitutionalism, International Law and Global Governance* 71 (Jeffery L. Dunoff and Joel P. Trachtman, eds. 2009)

order constitutionalization, like sectoral constitutionalization, comes in two guises. One side bases the changes firmly within the international legal order and adapts constitutionalism within this regime. The second centres the developments in international constitutionalization in constitutionalism as a concept (and not as an ideal) which assesses international law and identifies whether it has the necessary attributes to be constitutional.⁵⁸ The state's role in world order constitutionalization varies as the degree of change in its role fluctuates between theories.

International constitutionalization is a process resulting in essential norms of constitutionalism becoming part of the international legal order. This can have a range of outcomes depending upon the basis on which constitutionalization is judged to be occurring. An aspect of the constitutionalization process and one which is at the core of the rest of this piece is the role of constitutional norms in changing the role of the state within international governance. Constitutional norms may have a multitude of implications for the state.⁵⁹ The next section discusses, with particular reference to the state, the norms of constitutionalism which must be present or nascent in constitutionalization.

A. Constitutionalism within Constitutionalization

Arguably constitutionalism does not differ between the legal regimes it claims to order. This suggests that discussing constitutionalism as a model legal order, be it in the international, regional or international realm, should be relatively straightforward. Nonetheless, the use of constitutionalism in the international legal order is not without those who doubt its legitimate use. The arguments against the extension of constitutionalism to the international sphere are based upon understanding constitutionalism as intrinsically linked to the domestic legal order and suggestions that any transference outside of that realm is both illegitimate and illusory.⁶⁰

To maintain the same form of legal order two legal systems do not necessarily have to mirror each other. Certainly in domestic constitutionalism there are no two constitutions which are exactly alike.⁶¹ Yet, having made this claim there are norms associated with constitutionalism, for example, the rule of law, human rights, the separation of powers and democratic legitimacy, among others, which must be present. While there is a distinction between the underlying purposes of constitutionalism and the functional structure which accompanies its operation, if its aims is to substantiate a structure in which power is legitimately exercised, the question of the best system for this to occur within, be it an international, regional

⁵⁸ De Wet *supra* note 52 at 53, Erika De Wet, *Chapter VI Powers of the United Nations' Security Council* 92 – 115 (2004) alongside the emergence of regional value systems, De Wet Regional Value Systems *supra* note 43, Anne Peters, *The Merits of Global Constitutionalism* 16 *Indiana Journal of Global Legal Studies* 397, 398, (2009) Klabbers in Klabbers, Peters & Ulfstein, *supra* note 35, at 30

⁵⁹ Van Mulligen, *supra* n 55, at 282 - 283

⁶⁰ Walker, *supra* n 43, at 520-521

⁶¹ See for example, Raoul C. Van Caenegem, *An Historical Introduction to Western Constitutional Law* (1995)

or domestic framework, becomes vital.⁶² The legitimate exercise of constituent and constituted power is transposable to any level of constitutional configuration. Whereas a particular structure of governance may vary, it is the norms which underpin the aims of constitutional governance which must be present to assert that a governance order is or is becoming constitutionalised.

Norms of constitutionalism are central to identifying a system of governance as constitutional. They are the basis on which a constitutional system operates and sets out whom the holders of power are, how they are chosen as well as more substantive detail.⁶³ Norms of constitutionalism establish the relationship between the actors within a system. This is significant to the state as its role in an international constitutional system may vary depending on the demands of constitutionalism. This is the basis on which this discussion of the effect of international constitutionalization on the state is centred, with a footing within constitutionalism itself rather than a base in either international or domestic law.

B. Norms of Constitutionalism

To analyse the potential effect of constitutionalization on the state two constitutional norms are considered, the first is the separation of powers and the second democratic legitimacy. Obviously, this omits several other equally important norms of constitutionalism such as, among others, the rule of law and human rights, however, the choice of these two norms relates directly to the role of the state. Teubner's correctly asserts that constitutionalism outstrips the fetter between politics and law and while not disputing this claim, this nexus does not entirely dissipate and remains relevant.⁶⁴ Separation of powers and democratic legitimacy rest upon this nexus and, as such, their relevance to the future of the state within global governance is potentially more marked than other constitutional norms since it their operation which funnels law and politics. The changes occurring within international law and the allocation of constituted power in any emergent separation of powers model impacts upon constitutional agents. Perhaps the most visible impact will be upon the state as it ensures a functioning divestment of power amongst legitimate agents. Thus how any new subjects of international law, as well as states, are divested of their power is a central concern of any move towards a constitutional structure.

As representatives of individuals and as constituted power holders coupled with their interactions with each other, states' assumption of democratic legitimacy remains a difficult aspect of international law. Other potential constituted power holders, such as international organisations and individuals, must also be concerned with maintaining democratic legitimacy within the international legal order particularly since mandates for governance will become multi-situated as democratic

⁶² Walker, *supra* note 43, at 526

⁶³ For a general discussion see Larry Alexander (ed), '*Constitutionalism: Philosophical Foundations*' (1998)

⁶⁴ Teubner 'Fragments' *supra* note 45, at 8-11, 17

functionality evolves to recognise constituted power holders beyond and including states.⁶⁵ As a norm of constitutionalism democratic legitimacy ensures that the holders of constituent power are able to exercise their warrant and participate in debate while the transformation brought about by constitutionalism requires democratic legitimacy to establish its functionality within a global constitutional order. If international constitutionalization is occurring it is essential to understand how democratic legitimacy will transform the state's recognised role as the sole possessor of constituent and constituted power into another form to accommodate other actors.

The following subsections consider the role of both the separation of powers and democratic legitimacy as norms of constitutionalism within an international constitutionalization process. Further it considers the impact the normative constitutional order will have upon the role of the state and the nexus between the separation of powers and democratic legitimacy. This nexus, the rationale for which will be discussed, elevates the importance of both these particular norms for the role of state in an international constitutionalization process as their operation fundamentally shift the function and operation of the state within international governance.

1. *Separation of Powers*

Fundamentally, the separation of powers checks the exercise of constituted power. It divests power holders of their potential monopoly, dividing power amongst a number of constituted power holders ensuring a legitimate governance order operates as each constituted power holder oversees the exercise of power by another. Constituted power, the exercise of legitimate authority within a legal framework, is the basic currency of governance within a constitutional model and thus must not be held at a single point.⁶⁶ Maintaining constituted power holders at different governance points ensures that collusion or consolidation of constituted power becomes more difficult. To do otherwise would concentrate power at one point and such a concentration of constituted power enables its possessors to dictate governance. While full functioning democratic legitimacy or the exercise of a constituted warrant may partly curtail over-reaching by constituted power holders, divestment further ensures that legitimate governance, in line with other constitutional norms and maintained by differentiated constituted power holders, is sustained. Such divestment also prevents democratic legitimacy from becoming a majoritarian orthodoxy⁶⁷.

The classic horizontal triumvirate of executive, legislature and judiciary is the most common example of divestment in action yet for a constitutional separation of powers to exist an exact model does not necessarily need to be present though its

⁶⁵ Wheatley *supra* note 15, Terry Macdonald & Kate Macdonald, *Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry* 17 Eur. J. Int'l L. 89 (2006)

⁶⁶ Martin Loughlin, *The Idea of Public Law* 99 (2003)

⁶⁷ Maurice J. C Vile, *Constitutionalism and the Separation of Powers* 38 (1967)

utility within domestic legal order has been proven.⁶⁸ Rather it is the attempt to ensure the exercise of power is checked by divestment which is paramount. Even domestic constitutionalism recognises alternatives to the classical triumvirate, the most obvious example being federal systems and the development of constitutionalism within the EU.⁶⁹

The place of separation of powers within international constitutionalization theories, be it in sectoral or world order constitutionalization, is not always apparent. For instance, whether it is the WTO's or UN's structure, the development of a *jus cogens* based order or some combination of both the divestment of power within an international constitutionalization does not always figure as a central normative value.⁷⁰ Arguably, international constitutionalization necessitates an alternative to the horizontal separation of power structures recognised in domestic law but this also requires a reconsideration of the present international governance structure.

As already discussed, international governance was traditionally best understood as rooted to the state yet this could not be characterised as a divestment of power. Some authors argue that there are networks and interactions within the global system which are not represented by the statist model. Habermas suggests governance occurs in a multilateral form but at present international law does not contain the 'legislative competences and corresponding processes of political will formation' which would be necessary in a fully-functioning constitutional order.⁷¹ Constituted power, as situated at different points in international and the domestic governance, ensures that a shared structure of power is part of a constitutionalised legal order, this vertical form of separation of powers is key to this discussion.

Several alternative models have emerged that seek to understand the role of the state within the separation of powers in international constitutionalism. One is the geographical separation of powers, a second is proposed by Cottier and Hertig and is based upon a five story house with governance at each level and a third form is proposed by Peters, namely a form of compensatory constitutionalism and finally there are those theories that consider differentiated power to be realised within a particular institutional order. This latter group is best described as sectoral constitutionalization while the former are more aligned with world order constitutionalization. The distinction between world order constitutionalization which relies on a wider separation of powers model and sectoral constitutionalization where it is identifiable in the institutional structures of bodies such as the UN and the WTO is evident. What is common to both forms of constitutionalization is the acknowledgement that it is at the transnational level

⁶⁸ Vile *supra* note 67, For example, see description of the US and French separation of powers models 131- 232 and with regard to the UK, Ian Ward, *The English Constitution, Myths and Realities* 78 -81 (2004)

⁶⁹ Eoin Carolan, *The Separation of Powers: A Theory for the Modern State* (2009) Thomas Cottier, *International Trade Law: the Impact of Justiciability and Separations of Powers in EC Law* 5 Eur. Cons. L. Rev. 307 (2009)

⁷⁰ Trachtman, *supra* note 40, at 206, John O. McGinnis & Mark L. Movsesian, 'The World Trade Constitution' 114 Harv. L. Rev. 511 (2000)

⁷¹ Jürgen Habermas, *Between Naturalism and Religion* 323-324 (C. Cronin tr., 2008)

where the political system, constituted power and as such any separation of powers model should be considered to operate and not simply at the inter-state level. This illustrates the difficulty for international constitutionalization theories, the legitimacy of a governance regime which would comply with the norms of constitutionalism is difficult to identify in the present international legal order.

The traditional horizontal separation of powers is bypassed and the focus shifted to an alternative basis for the divestment of constituted power. One such alternative is the geographical or vertical separation of powers which presents an interesting method of understanding the place of the state in international constitutionalization. In the vertical separation of powers governance occurs at different points, this can include local, regional, state, continental and global levels. Arguably this is already present in some federal models, in devolved states, or in the processes of integration such as within the EU.⁷² Loveland's description incorporates two forms of separation of powers within his model; one horizontal and the other vertical.⁷³ Loveland's division of power differentiates between territorial centres which operate at separate levels of governance. Constituted power is divided vertically into geographical locations as well as in the classic horizontal triumvirate. For instance, in a federalised state power is located centrally, in the classic horizontally triumvirate, as well as vertically at the federal and state level.⁷⁴

Different functions of constituted power are performed at the local, federal, national, regional and international levels. Vertical separation of powers also introduces regulation of supervision into each layer of governance and as such establishes limits on the exercise of constituted power. While establishing the presence of a horizontal separation of powers may remain improbable in international law, a vertical separation of powers may provide a strong basis on which to balance the governance orders. The traditional state would be recognised as one level of governance, while its own internal federal or other model would represent another, its membership of regional and global organisations yet another. This necessarily would require that each level moderates the workings of the other. The EU for instance would be required to formalise its interactions with the UN, a process potentially underway following the line of Kadi decisions.⁷⁵ At present, whether and how the Court of Justice should consider Security Council resolutions which it believes to have violated fundamental rights is unclear yet if the relationship was formalised it may provide a system of vertical separation of powers between the continental and international levels, particularly as the International Court of Justice has, thus far, rejected any judicial review power.⁷⁶

⁷² See for example Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam, European Constitution Making Revisited* 36 *Com. Mar. L. Rev.* 703(1999)

⁷³ Ian Loveland, *Constitutional Law, Administrative Law and Human Rights: A Critical Introduction* 14 (2009)

⁷⁴ *Id.* 14

⁷⁵ Klabbers, Peters & Ulfstein, *supra* note 35, 2, Gráinne De Burca, *The EU, the European Court of Justice and the International Legal Order after Kadi* 51 *Harv. J. Int. L.* 1 (2010), Jan Klabbers, *Kadi Justice at the Security Council* 4 *Int. Org. L. Rev.* 1 (2007)

⁷⁶ Jan Klabbers, *Straddling Law and Politics: Judicial Review in International Law in Towards World Constitutionalism, Issues in the Legal Ordering of the World Community* (Ronald St. J. Macdonald

Cottier and Hertig's separation of powers model is based upon a '[f]ive story house'.⁷⁷ Levels of governance are covered from the local level, through a federal system to the state and to a regional level and finally at the point of global governance. Each level maintains constitutional norms in its governance order. While all domestic systems are not necessarily federal; this proposal calls for at the very least two levels, the domestic and international, though ideally local, regional and continental layers would be added to the structure. This model does not require that each level mirror each other in content or structure.⁷⁸ While the authors do not directly address this model to the necessity of separation of powers or the divestment of constituted power it is linked to the allocation and differentiation of power.

Like, Loveland, Cottier and Hertig present a model where the divestment of power occurs along a vertical divide. In these theories, the issue for international constitutionalization becomes whether there is a move towards a unitary system with one horizontal or vertical separation of powers or whether a combination of both vertical and horizontal layers is necessary. Any of these options would not require a change in the form of state but rather a shift in the state from the centre of international law to a point where it is just one of the layers of power, still an important layer, but one which shares the international governance regime with other points of governance.

In the alternate, Peters argues for a form of a compensatory constitutionalism.⁷⁹ She suggests that a process of de-constitutionalization within states underpins a move away from the statist model of consent based international law. The fundamental norms present in an international constitutional order make up for any loss of authority by the state.⁸⁰ Peters argues that the de-constitutionalization of the domestic sphere is or will be, filled by constitutionalization at the international level. While this re-construction of international law does not unavoidably result in the destruction of the state it certainly requires a realignment of governance powers into a differentiated separation of powers model. If international constitutionalization is to compensate for the ebbing away of state constitutionalism, then the interests that an ever stronger international constitution represents must be recognised. Conceivably state and international interests do not as easily transform from one to the other as is suggested within compensatory constitutionalism.

In Peters' model the representation of interests can move from the state to the international level. In this theory the same, or at the very least quite similar, forms of

and Donald M. Johnston eds. 2005), Jose Alvarez, *Judging the Security Council* 90 Am. J. of Int. L. 1(1996)

⁷⁷ Thomas Cottier & Maya Hertig, *The Prospects of 21st Constitutionalism* 7 Max Planck Yearbook of United Nations Law 261, 299 – 304 (2003)

⁷⁸ *Id.* 301

⁷⁹ Peters, *supra* note 7 This is related to Tomuschat's arguments that see international constitutional law as an indelibly linked to domestic public law, see Tomuschat *supra* note 28, at 10.

⁸⁰ Peters, *supra* note 7 and her contribution to in Klabbers, Peters & Ulfstein, *supra* note 35

constitutionalism are easily transposable and contemporaneously present within domestic and international law. This requires the dispersal of governance beyond the horizontal into a vertical stream that could theoretically shift as it develops in a different form of constitutional order. This opens up a number of possibilities for the state and the realisation of a separation of powers within international law. The dispersal of constituted power could be represented by differing governance competences at the state and international level. Yet, in Peters' compensatory constitutionalism, while power is dispersed, there does not appear to be a system for one holder of power to be able to hold another to account. Peters regards the essential norms of the international legal system as the basis for constitutional functions. In practice, for Peters, judicial activism will realise these norms. Still, this necessitates a strong judicial arm to be present in compensatory constitutionalism to divest the holders of power of some of their authority.

If, as Peters asserts, state constitutions no longer possess the totality of governance, this suggests at some previous point states had absolute control. This is an absolutist Westphalian model and assumes that states had 'total constitutions'.⁸¹ Secondly, and most significantly from the perspective of this investigation it remains a state based constitutional regime which is pushed up and compensated for at the global level.⁸² This does not present a system for the divestment of constituted power among different points of governance other than what a state would consent to, and as such does not represent a radical change from the current international legal order. Nor does it establish a fully formed separation of powers model.

Loveland's, Cottier and Hertig's and Peters' proposals present reasoned basis for understanding how the separation of powers may be understood beyond the horizontal model to where the unitary state no longer takes centre stage as the ultimate authority.⁸³ The models suggested by both Loveland and Cottier and Hertig imply that there is no specific minimum required to establish a 'true' separation of powers. Ultimately, the separation of powers divides constituted power and as such may be horizontal, horizontal and vertical and potentially only vertical. There is no "perfect" system. The aims of the separation of powers may be achieved through a number of structures, but the divestment of power remains a central norm which must subsist at the end of a process of constitutionalization.

The shift towards the vertical divestment model raises issues regarding hierarchy and structure. The relative fluidity of the system coupled with the entrenchment of democratic legitimacy at each level goes some way to prevent the entrenchment of a subordinating system nonetheless such a possibility must be borne in mind particularly as the vertical model moves beyond the state and the state itself

⁸¹ Colin R. Munro *Studies in Constitutional Law* (1999)

⁸² Peters, *supra* note 7, at 580.

⁸³ See also Verdross' direct analogy between the competences of the international legal order with federal systems, In an analogous way, the concrete partition of competences between international law and the municipal orders of the States is different at different epochs, changes with the change of contents of positive international law. Joseph L. Kunz, *The 'Vienna School' and International Law* 11 N. Y.U. Quarterly Law Review 370, 411(1933-1934)

becomes part of a broader structure.⁸⁴ Such concerns are eruditely discussed by Krisch proffering a heterarchical structure as an alternate to constitutionalist proposals.⁸⁵ Krisch proposes a reliance on norms to ensure that hierarchical domination does not establish itself. Kumm's alternative, where different points of governance operate within a strong normative structure arguably answers some of Krisch's concerns.⁸⁶ For the state, Kumm's approach maintains the state as a point of governance but also diffuses this exercise of constituted power to other sites within a normative constitutional model. Such an approach recognises the entirety of the operation of constitutionalism and the necessary interaction of each substantive norm, for example, separation of power tempers democratic legitimacy and *vice versa*.

In considering the move from a statist regime and the concentration on the relationship with domestic constitutionalism, international constitutionalization theories have encapsulated the notion that governance occurs at multiple levels, that the holders of constituted power do not have to be at the same level of governance and that the separation of powers should be present in any debate on the process of constitutionalization. Nonetheless an alternate approach also subsists within constitutionalization debates which suggest that the actual models of separation of powers regimes are found within international institutions.

One such approach is to recognise the importance of institutional regimes already present in international law. Simma argues that the UN Charter is an 'embryonic constitution of the world community.'⁸⁷ Linking international constitutionalism to domestic constitutionalism, Simma argues that the similarities between the two include a traditional if extremely truncated separation of powers.⁸⁸ This excludes a normative approach to constitutionalism. It also excludes a debate on whether the UN can be argued to have a separation of powers structure and if it is found that it has, what this should imply about the present governance structure within the organisation. Relying heavily on the domestic and horizontal elements of constitutionalism, Simma, in seeking to identify constitutional forms, limits the possibilities available to international constitutionalism and as such limits the potential for the state within an international constitutional order. These limitations are also present in the work of Fassbender, who recognises the UN Charter as a constitution for the international community, but again in doing so confirms the existent failures of this organisation and the role of the state as focal point of international governance into the international legal order. These models of separation of powers are not reliant on constitutionalism as a starting point of

⁸⁴ Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, 75 (1999)

⁸⁵ Krisch *supra* note 15, at 70 -79

⁸⁶ Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State* in *Ruling the World? Constitutionalism, International Law and Global Governance* 258 – 32 (Jeffery L. Dunoff & Joel P. Trachtman eds. 2009)

⁸⁷ Bruno Simma, *From Bilateralism to Community Interest* 250 *Rec. Des. Cours* 258 (1994-VI)

⁸⁸ *Id.* 258-259

debate, rather this form of constitutionalization centres on the emulation of the domestic realm.⁸⁹

These institutional positions suggest that there is a subsisting separation of powers model which would stand a test of constitutionalism. Yet, a fully considered reflection on the institutional arrangements suggests that the separation of powers does not appear to subsist or operate in line with understood constitutional norms. Naturally, differentiating between the impacts this actually has for international constitutionalization is not within this discussion, it does bear pointing out that currently international institutions would fall far short of establishing a separation of powers model which succeeds in moving the state from its position as the sole subject of international law and the holder of constituted power.

In a process of international constitutionalization the state cannot maintain its place as the sole holder of constituted power, particularly as international organisations assert authoritative control. Ultimately the separation of powers necessitates a substantial recognition of the shift in the balance of power within international law and the recognition that at the very least regional and global organisations could also be considered to be constituted power holders. Should constitutionalization actually occur within international law the state will be replaced at the centre of international decision and law making. This is not a claim that the state will be entirely removed from the international legal order, as Schachter has commented, the state is resilient, but rather that it will have to give way in a differentiated system of governance.⁹⁰ Nonetheless, such a shift must be concert with other constitutional norms, such as the one next discussed, as each are reliant on the other function within a constitutional governance regime.

2. *Democratic Legitimacy*

According to Llanque, whereas a constitution is static, '[d]emocracy is the dynamic element in constitutional democracies.'⁹¹ Democracy is entrenched as the ideal and most justifiable form of governance at the state level.⁹² The necessary force of constituent power is missing from any system where democracy is absent.⁹³ One of the consistent debates within both general international legal governance and institutional law is the subsisting democratic deficit.⁹⁴ Indeed Wheatley goes so far

⁸⁹ Fassbender *supra* note 57, Bardo Fassbender, *The United Nations Charter as Constitution of The International Community* 36 Col. J. of Trans. L. 529 (1998)

⁹⁰ Schachter *supra* note 5, at 21.

⁹¹ Marcus Llanque, *On Constitutional Membership* in *The Twilight of Constitutionalism* 175 (Petra Dobner and Martin Loughlin eds 2010)

⁹² For a worldwide view of the instances of democracy see

<http://www.freedomhouse.org/template.cfm?page=363&year=2010>

⁹³ John Dunne, 'Setting the People Free: The Story of Democracy' (2005) 13-15

⁹⁴ See for example, Steven Wheatley, *Democracy in International Law: A European Perspective* 51 Int. Comp. L. Quarterly 225 (2002), Armin Von Bogandy, *Globalization and Europe: How to Square Democracy, Globalization, and International Law* 15 Eur. J. Int'l L. 885(2004), Thomas Christiano, *Democratic Legitimacy and International Institutions* in *The Philosophy of International Law* 119 (Samantha Besson & John Tasioulas eds. 2010)

as to call democracy a 'neglected concept' in international law.⁹⁵ In an international constitutionalization process the question for the state becomes whether internal democratic process are enough to satisfy constitutional norms, if these are not entrenched in states what impact this has for constitutionalization beyond its borders and whether some form of international democracy must take hold to before a process of constitutionalization can be said to begin.

Democracy is not a monolithic ideal, it may be divided between direct and representative democracy yet to establish legitimacy arguably democracy must have some substantive form within a legal order.⁹⁶ Democracy that is too remote from the actual governance structure, which arguably is the case within international law and which is entirely reliant on domestic democratic institutions, is not attaining the minimum standard necessary in constitutionalism potentially establishing a substantive barrier to international constitutionalization's entrenchment beyond the state. Participative democracy is preferred in an ideal constitutional order as it does not regard democracy as merely majoritarianism. Simple majorities disenfranchise some constituent power holders and prevents the deliberation necessary to ensure conflict is resolved.⁹⁷ Norms of constitutionalism also ensure that democracy is neither too remote nor bound to simple majoritarianism. The separation of powers, the rule of law together with democratic legitimacy ensures that a constitutional governance order is maintained. Nonetheless, remoteness may be the key differentiator between international and other forms of constitutional entrenchment.

Legitimacy is as important as democracy in establishing a constitutional structure, indeed democracy forms part of a legitimate order. While legitimacy is at times equated with popular opinion (or majoritarianism) within constitutionalism this should be rejected as inadequate.⁹⁸ Legitimacy is also associated with transparency. For instance, Rehfeld suggests that transparency is necessary for constituent power holders to accept the legitimacy of the actions of the constituted power holders. The opinion of the constituent power holders, the justification and transparency of action contribute to establishing the legitimacy necessary for a democratic system to fully function, thus democracy and legitimacy are intertwined as the latter cannot be established in a constitutional order without the former.

Democratic legitimacy maintains the link between the holders of constituent power and those who exercise constituted power; it ensures that power is exercised in a transparent and justifiable manner and inculcates a process for the removal of constituted power in situations where the holders of such power no longer have the support of the constituent power holders. This is indispensable to a constitutional order and as such to international constitutionalization process.

⁹⁵ Wheatley *supra* note 94, at 225.

⁹⁶ Von Bogandy *supra* note 94, at 890.

⁹⁷ Cass R. Sunstein, *Designing Democracy: What Constitutions Do* 97 (2001), for a discussion of democracy and judicial review see Jeffery Goldsworthy, *Structural Judicial Review and the Objection from Democracy* 60 *Uni. of Tor. L. J.* 137 (2010)

⁹⁸ Andrew Rehfeld, *The Concept of Constituency* 15 - 16 (2005)

For a constitutional order to fully deploy the norms of constitutionalism it must be regarded as democratic. To ensure the integrity of the system other essential elements of constitutionalism, such as the rule of law and separation of powers, must also fully function on a legitimate basis. Constitutionalism and democratic legitimacy are bound together as any legitimate change to the constitution, besides revolution, can only take place through a democratic process.⁹⁹ While the representative or direct democratic ideals of constitutionalism may be pitted against each other, the pull of democracy and constitutionalism, arguably settle the opposing views to the extent that is necessary to establish democratic legitimacy within a system.¹⁰⁰

Within international constitutionalization theories 'possible democracy' is at times identified within a process where constitutionalism is being established.¹⁰¹ Democracy's inclusion in the international constitutionalization debate, even if it is ultimately dismissed, indicates that it cannot be ignored. A very basic argument is that democratic states participating in international governance, once the legal order enables these states to participate on a legitimate basis, is enough to establish democracy within international law. Yet, this does not adequately address a number of concerns. First, the role that non-democratic states play within international law, second, the remoteness of states, democratic or otherwise from decision-making structures, third, the voting structures of the main international organisations which do not allow for full democratic practice, fourth, the manner in which international law is created, particularly custom, not always enabling equal participation and finally the relative power of certain states to participate within the process of international governance. All of these objections are besides the questionable position that states would legitimately represent the constituent power holders within an international constitutional regime.

Regarding undemocratic states, arguably without their democratisation, even if global democratic systems were established within an international separation of powers or divestment model with all that this must entail including; legitimacy, transparency and participation, these undemocratic points of governance would be enough to hamper full constitutionalization. This, in turn, renders pointless any pursuit of a democratic international legal order while some states remain undemocratic. Yet, incremental constitutionalization may in itself further the democratic cause within states. The spread of democracy since the end of the Cold War,¹⁰² the inculcation of democracy into Security Council Resolutions,¹⁰³ as well as

⁹⁹ For a discussion of the antagonism and participation in democratic constitutional orders see Chantal Mouffe, *The Democratic Paradox* 117 (2000)

¹⁰⁰ Llanque, *supra* note 91, at 175-177

¹⁰¹ Peters & Armingeon *supra* note 39, at 38.

¹⁰² Report of the Secretary General 'Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies' A/64/372 28th Sept 2009

¹⁰³ See for example, Security Council Resolution 2009 'The Situation in Libya' (16th Sept 2011), Security Council Resolution 2061, 'The Situation concerning Iraq' 25th July 2012, Security Council Resolution 2041, The Situation in Afghanistan, 22nd March 2012, Steven Wheatley, *The Security Council, Democratic Legitimacy and Regime Change in Iraq* 17 Eur. J. Int'l L. 531 (2006)

into doctrines such as the responsibility to protect together with its place as a human right, goes some way to inculcating it as essential to the international legal order.¹⁰⁴ Democracy's embedding into states raises the possibility that democratisation could occur alongside constitutionalization, though the latter remains incomplete while the former continues unrealised and will formation incoherent.

Even in instances where states are fully democratic the constituted power holders within that state are bound to the constituent power holders within that state. To be fully democratically legitimate within the state, the state must always only act in the state's interest and ought not to take extraneous considerations into account. This limitation stifles the state as the sole constituent power holder within an international constitutionalization process and establishes the need to reconsider the place of the state within international governance. The difficulties created by such remoteness can only be rectified through the establishment of democratic will formation at all points of governance within the international legal order. Wheatley's cosmopolitan democracy identifies the need to reallocate 'political authority to ensure the participation of all those affected in processes of democratic will formation.'¹⁰⁵ In doing so Wheatley recognises that often the lesser peaks of isolated democratisation within individual governance structures such as international institutions are considered in the international democratisation context.¹⁰⁶ Certainly, within the international constitutionalization debate, thus far, this lesser form of democracy appears the height of ambition.¹⁰⁷ Tackling remoteness and, as such, the democratisation of all points of governance needs incorporation into international constitutionalization.

Several differing positions within the constitutionalization debate create a picture of the place of democracy within these theories and also reflects the wider issues that international law, beyond constitutionalization, has with democratic practice. De Wet acknowledges the importance of democracy, but as a human right to be enforced domestically and presupposes that domestic constitutionalism satisfies the need for democratic legitimacy in international law sidestepping governance beyond the state and issues of remoteness.¹⁰⁸ From De Wet's perspective little change is thus required in the state's current role. Yet, as just discussed it highly questionable as to whether this would satisfy the requirements of normative constitutionalism. Democratic participation of all the subjects of international law requires a model which goes much further than relying on states to internally establish democratic legitimacy; it also leaves open the question of whether, if De Wet is correct, all states

¹⁰⁴ 'The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty' (Ottawa, International Development Research Centre, 2001) 34-35, 44, Thomas Franck, *The Emerging Right to Democratic Governance* 86 Am. J. Int. L. 46 (1992), Gregory H. Fox & Brad R. Roth (eds.) *Democratic Governance and International Law* (2000)

¹⁰⁵ Wheatley *supra* note 15, at 64

¹⁰⁶ Even if such democratisation within international law can be traced to a particular hegemonic project in the post-war era or as originally as a western state ethic, see Christian Reus-Smit *The Constitutional Structure of International Society and the Nature of Fundamental Institutions* 51 Int'l Org. 555, 563, 578 (1997)

¹⁰⁷ De Wet *supra* note 52, at 63

¹⁰⁸ De Wet *supra* note 52, at 63

would have to be democratic before constitutionalization could progress to become a full constitutional order. Indeed while it may be argued by some that the process of constitutionalization will itself further support democratisation within states but this can only occur if democratisation is incorporated into the process.¹⁰⁹

Habermas makes democratic legitimacy a point of departure for all theories of constitutionalization and points to the lack of democracy in international law as critical to the debate.¹¹⁰ Further, he suggests that those that question the necessity of democratic legitimacy within international constitutionalization but still advocate recognising an existent constitutionalism are writing-off democracy from the global constitutional order. For Habermas, this disregard for democracy stems from perceiving international law as never actually or potentially being democratic. This would suggest that democracy's absence must be accepted as the fundamental difference between domestic and international constitutionalism.¹¹¹ Arguably, such a fundamental differentiation puts the international governance order beyond constitutionalism and perhaps beyond any governance regime which good rightly be called legitimate, a point of ignominy for international law.

Habermas argues that the identification of a transnational space is necessary to enable the legitimisation of a political constitution. This requires the establishment of democratic models of institutional orders and highlights the difficulties present in theories of international governance; identifying the mass to which a constitutional order is attached and as such giving consideration to enabling the exercise of the democratic warrant held by constituent power holders to ensure will formation. If, as Habermas argues, the subjects of world constitutionalism are individuals and states, or beyond this if international organisations were to be included, state's current monopolisation of representation does not satisfy the needs of constitutionalism.¹¹² In fact, accepting other subjects within the international legal order, such as states and individuals, as well as other potential subjects such as international organisations in the maintenance of the legal order is perhaps a more realistic proposition than ignoring their participation and declaring democratic legitimacy impossible.

Habermas' position is certainly to be preferred to those that argue for an existent constitutionalism which either accepts the *status quo* of or alternatively presses the state's demise too far. State's interests are just that, they represent the domestic constituent power holders' interests in the states, while they may have legitimate force within the state themselves, with regard global interests, they form a part, but not the entirety of the necessary interests to be accounted for in a constitutional order, their remoteness excluding their monopolisation. Democratic legitimacy, within international constitutionalization theories, is inconsistent. While currently,

¹⁰⁹ Von Bogandy *supra* note 94, 894-896

¹¹⁰ Habermas, *supra* note 11, at 445-445.

¹¹¹ A good example of this position is that of De Wet, see De Wet *supra* note 52, at 51. Krisch points to another difficulty, the struggle in a fragmented international system to establish democracy, but like Habermas, Krisch does not consider the possibility of establishing democratic legitimacy within international law impossible. Krisch *supra* note 15, at 70 -77

¹¹² Habermas, *supra* note 11, at 449.

most constitutionalization theories appear to mainly consist of state based processes with little regard to the establishment of community interests through any democratic process, there is generally recognition that democracy must play a role. Those theories remain reliant upon a state-centric view of how democracy can be established within a constitutionalization process but must recognise that for democratic legitimacy to be established the state cannot be the sole constituent power holder.

International constitutionalization potentially pushes democratisation forward, both internally to the state and beyond at other points of governance within the international legal order but as they are both inter-reliant, democratisation must also have its own propulsion. The coupling of these two elements creates a fundamental issue for those constitutionalists that argue for present constitutionalism. Even those that limit constitutionalization to sectors or organisations must still contend with undemocratic states which remain a bar even if these sectors or organisation themselves become democratic. This note of caution is not to suggest the impossibility of either democratisation or constitutionalization but rather presents a basis for discussion of how either may be achieved in concert with each other.

C. Norms of Constitutionalism and the State

What impact would the separation of powers and democratic legitimacy have upon the international legal order? A simple answer, based upon some of the more conservative constitutionalization theories, is very little. Yet, international constitutionalization, if based on existent international law including the place of states, individuals, and international organisations requires more than recognition of the present international order as constitutional, as the foregoing analysis has established the norms of constitutionalism requires some change in the traditional understandings of the state's role within the international legal order.

An alternative route, and the one that is proposed here, is that the process of constitutionalization within international law should be recognised as an ongoing process of reform. From this stance, it can be accepted that the norms of constitutionalism do not necessarily have to present for the process itself to be underway. Therefore it can be acknowledged that there is an absence of a separation of powers which would truly restrain and differentiate between the power holders within international law. It can also be recognised that democratic legitimacy is presently lacking within international law, and while establishing it may be difficult its absence is detrimental to any claim to an existing fully constitutionalised system.

Crucially, these two norms of constitutionalism, among others, must be nascent or at the very least potentially present, in some form for constitutionalization to be described as being underway and must come to fruition to enable the international legal order to become constitutionalised. But before this occurs the place of the state within the international legal must be re-considered. Evidently the traditional

Westphalian international law, did not, nor did it intend to, ensconce itself in democracy or the separation of powers and thus it must be left behind to establish a constitutional model which is based around constitutional norms.

The separation of power requires the state to step back from being the sole subject of international law and take a place alongside other points of governance. If a vertical model of the separation of powers were to be accepted, and became part of a layered system of constituted power holders, this would fundamentally change the position of the state in the international governance order. Arguably, this is already occurring with the advent of supranational bodies such as the EU, however, other levels of governance must be recognised as on a par with state constituted power to fully entrench the separation of powers. This does not dismantle the state, but rather recognises that it must be re-imagined in a new context in line with other constitutional norms to ensure its proper operation.

Democratic legitimacy requires that all constituent power holders' interests be recognised. Again, this does not require the entire displacement of the state, but rather a movement away from the assumption that the state entirely represents the interests of all those within its borders, particularly when those states are undemocratic. Further, it must be acknowledged that the interests of the international legal order, international organisations and NGOs are different and must also be accounted for within a constitutional arrangement. The mechanics by which this may be achieved are most evident in the changing nature of some international institutions as well as the changes in participation of stakeholders, the institutions themselves and international officers such as the UN Secretary General. This does not mean that the state is entirely excluded, but as with the separation of powers, to establish a constitutional order the needs of democratic legitimacy must be satisfied and to ensure its proper operation, as with the separation of powers, it must be guaranteed alongside other constitutional norms.

4. Conclusion

Constitutionalization does not necessarily provide an answer to all the difficulties relating to the place of the state in present international law, indeed it may only attract more questions rather than answers. Yet, constitutionalism sets out parameters which would remedy some of the problems presented by the change in the status of the state within international law particularly its place as a point of governance and the requirements of democratic legitimacy.

Constitutionalization within international law will not create Shangri La. Within states it does not achieve such a result. Recognised within many international constitutionalization theories are the incoherencies in international law which inevitably lead to the conclusion that the international legal order is not a fully constituted system. Yet the task of constitutionalism must be more than creating a coherent legal order. For instance, regarding the place of the state in international law constitutionalism provides an analytical tool for understanding the gaps which

persist in the international legal order and offers potential methods of filling such fissures.

Constitutionalization will, however, profoundly affect the role of the state within the international legal order. The role of state is already in a state of flux, and constitutionalization and the norms which accompany the process offer a potential resolution to some of the issues related to governance while also setting out a possible alternative legal order. Within an international constitutional order the state would have to give way to other bases of power.

Separation of powers would require the recognition that power must be held beyond the state, but also that there must be some form of check on state power beyond what presently exists within international law. Democratic legitimacy requires that interests beyond those presented by states must be accounted for in the decision making processes of the international legal order and the continued existence of undemocratic states causes real difficulties in claiming any legitimate system is operational. These challenges do not necessarily require a world parliament or government but rather some form of engagement of all interests in the international legal order.

While separation of powers and democratic legitimacy are only two of a potential large number of constitutional norms that would become substantiated in an international constitutional order, they do represent two of the most compelling challenges to the role of the state in international law. In an international constitutional order the state would have to give way to the other subjects of international law and integrate into a system which would no longer accept its supremacy. Constitutionalization, both as a potential process or reform and as a tried and tested governance order offers a system which utilises the states position to its fullest extent while accepting its limitations.